No. 3544

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AL. WEATHERS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We respectfully ask the Court to grant a rehearing of this cause; and we earnestly beg the learned judge who wrote the opinion herein to re-examine the record in connection with the reasons which we present herein and the facts upon which we rely to support our appeal that this cause be reheard before your Honors.

The *corpus delicti* in this case, was the presence of the defendant Al. Weathers, on the "Diana" in

Admiralty Cove on July 8th, shooting or participating in shooting at the "Forrester" with intent to rob and steal fish; and this was not proved by the evidence; there was no evidence in the case that Al. Weathers was *on* the "Diana", *in* Admiralty Cove, *on* July 8th, shooting *or* participating in shooting at the "Forrester".

We assert with absolute confidence that a review of the record on defendant's writ of error will disclose beyond possibility of dispute, that there is not even a scintilla of evidence or proof that on July 8, 1920, when the indictment alleges that the crime of assault with intent to commit robbery of fish from a trap, charged in the second count, and the crime of assault with intent to commit robbery of fish from a scow, charged in the third count, that the defendant Al. Weathers was *in* Admiralty Cove or *on* the "Diana", from which the shots were fired on the "Forrester", *or* participated in the assault from the "Diana".

The learned counsel who represented the defendant at the oral argument and who filed the brief on his behalf in this Court, omitted to bring to the attention of the Court clearly enough to have impressed the memory of the learned judge who wrote the opinion, that *one* of the grounds on which they sought a reversal was, that there was *no evidence* in the record to show or prove that defendant Al. Weathers was *on* the "Diana" *in* Admiralty Cove *on* July 8th, *when* the assault upon the "Forrester" is charged.

In the *brief* of the learned counsel for defendant in this Court, this ground *is* stated in a short paragraph (Tr. on page 25),—*hidden* in the "statement of the case"; thus:

> "There is *no evidence* by any witness for the Government that defendant Al. Weathers was on the boat which the Government witnesses say they identified as the "Diana" *at the time* of the alleged shooting." (Italics ours.)

There is not a word in the opinion of the learned judge upon this *vital* question in the case, nor anything to indicate that the learned judge believed that the attorneys for the defendant on the oral argument or in their brief, had expected that the Court would consider and decide this question or that it was involved on defendant's writ of error to this Court.

The question, we respectively submit, is raised substantially by the tenth assignment of error, viz.:

> "The Court erred in pronouncing sentence and judgment against the defendant" (Tr. 397).

And, knowing this Court as we do, we feel sure that the Court would have considered and decided this vital question, whether raised by assignment of error or not, and especially under its rule 24, subdivision 4, had the point been clearly raised in the brief or had the Court been conscious that the consideration and decision of this phase of the case was involved.

When his cause was presented to this Court in the oral argument and in the printed brief, the learned counsel confined his argument and presentation of facts to the question whether or not the trial Court had committed error in allowing the testimony of witnesses tending to show that *other offenses* of a similar nature had been committed by the "Diana" and the defendant *before* July 8th, the date of the offenses charged in the indictment, and testimony tending to identify the "Diana" on July 10th, two days *after,* at another and distant point, "Sisters Island", as the same boat from which the shots were fired at Admiralty Cove on July 8th, and tending to prove that defendant Al. Weathers was then, on July 10th, at "Sisters Island", on the "Diana".

It was not shown to this Court, either on the argument or in the brief, that there is *no* evidence that defendant Al. Weathers *was on* the "Diana", *in* Admiralty Cove, *on* July 8th, *when* the indictment charges that shots were fired from the "Diana", in Admiralty Cove, at the "Forrester".

Nor does the brief of the learned United States Attorney exhibit, nor did he in his oral argument present to this Court, any evidence in the record, showing that the defendant Al. Weathers was on board the "Diana" on July 8th in Admiralty Cove, when shots were fired from the "Diana" at the "Forrester".

The rulings of the trial Court, allowing evidence of similar offenses *before* July 8th, and of the presence at "Sisters Island" of the "Diana", two days *after* July 8th, with defendant on board, were the only matters presented to your Honors by both counsel for the defendant and counsel for the Government.

Whether or not the defendant Al. Weathers *was on* the "Diana *on July 8th at* "Admiralty Cove", *when* shots were fired from the "Diana" at the "Forrester", was neither specially presented to this Court in argument of this cause nor in the briefs, nor was *that* question considered or ruled by this Court in deciding this case.

The *opinion* of the learned judge of this Court follows the case as presented at the argument and in the briefs and decides only the *two* phases of the rulings, allowing evidence of *prior* similar offenses, and identifying the "Diana" with defendant on board at "Sisters Island" two days *after* the shooting from the "Diana" at the "Forrester" in "Admiralty Cove", on July 8th, as charged in the indictment.

Therefore, we most earnestly appeal to this Court, as a matter impelling justice, and especially to the learned judge who wrote the opinion in this case, to *again* examine this record in connection with this petition, and if the Court find that we are fairly sustained in our contention that there is *no* evidence or proof in this record that defendant Al. Weathers

was *on board* the "Diana" *in* "Admiralty Cove", *on* July 8th, *when* the indictment charges that shots were fired from the "Diana" at the "Forrester", then, that we be granted a rehearing of this cause.

Of course, it will be conceded that the *legal presumption of innocence* overcomes all possible inferences of guilt, so that no conviction could possibly be had or be sustained that would have its foundation solely upon inferences or presumptions.

The indictment charges that the assault was made *on July 8th* by shots fired from the "Diana" at the "Forrester" in Admiralty Cove, Alaska.

There were *thirteen* men on the "Forrester" at the time of this assault on July 8th (Tr. 8); and *two* only, of these thirteen men, testified on the trial— Capt. Knutson, the master (Tr. 7), and Sofus Ellison, foreman (Tr. 54). *Neither* of these two witnesses testified to a single fact identifying defendant as being on the "Diana" *at the time* of this assault, either by appearance, size, voice or otherwise. But the witness Ellison, did testify:

> "Q. Now, at the time you saw this boat doing any shooting, I will ask you whether you saw *any men on board?*
> A. No, sir, I didn't" (Tr. 67).

There were *six* other witnesses, Ivor Stenso (Tr. 94), Swan Swanson (Tr. 115), Henry Alexander (Tr. 139), Andrew Abrahamson (Tr. 159), Herman Mitts (Tr. 175), and Carl Peterson (Tr. 191), who testified that they were on Admiralty Island,

saw the "Diana" in Admiralty Cove on July 8th and heard shots fired from the "Diana" at the "Forrester", but *not one* of these six witnesses testified to a single fact identifying defendant as being on the "Diana" *at the time* of the assault, either by appearance, size, voice or otherwise.

There were *no other* witnesses in the case who were in Admiralty Cove on July 8th when this assault was made, *nor* was there *any other* evidence in the case as to or concerning the "Diana" in Admiralty Cove or the shooting from her at the "Forrester" on July 8th.

The *only other* evidence in the case was as to the "Diana" at other *distant* points at times many days *before* and one occasion two and other occasions many days *after* July 8th; some of this evidence tended to prove *similar* offenses by the "Diana" at *distant* points from Admiralty Cove and a man on board resembling defendant, and the rest of the evidence tended to identify the "Diana" and defendant on board the "Diana".

But there was absolutely *no evidence* in the case identifying defendant in any manner as being on board the "Diana" on July 8th when this assault was made on the "Forrester".

There is no evidence in this record that the defendant Al. Weathers *was on board the "Diana"* in Admiralty Cove *on July 8th* when the indictment charges and the evidence shows that shots were fired from the "Diana" at the "Forrester".

The *only* evidence in the case tending to identify the "Diana" and that a man whose height and voice resembled the height and voice of the defendant was on the "Diana" at other places and on the "Diana" at Sisters Island, is evidence relating to occasions at other places *before* and at Sisters Island *after* July 8th; and this evidence was admitted by the Court *solely* for the purpose and the Court expressly charged the jury that it could be considered by the jury *solely* for the purpose of proving similar offenses to those charged in the indictment, in order to ascertain *the intent* with which the assault was made and the shots were fired from the "Diana" in Admiralty Cove on July 8th; but could *not* be used to prove that because he was on the "Diana" *before* at other distant places and *after* at Sisters Island, they could find that defendant was on board the "Diana" *on* July 8th when the assault was made from the "Diana" on the "Forrester".

The Court charged the jury:

> "There has been evidence introduced of similar offenses alleged to have been committed by the defendants *at other times and places.* The evidence of these other transactions was admitted before you *for the sole purpose* of the bearing which it might have on the question *as to intent.* * * * In other words, the evidence of other offenses *can only* be taken into consideration by you *if you find* that the particular transactions charged to have occurred at Admiralty Cove *did occur* and you have *passed on to* the question of ascertaining the *intent* with which *those acts* were done." (Tr. 363-364.)

The evidence in this case does not connect defendant Al. Weathers with the assault and shooting from the "Diana", on July 8th, at the "Forrester", in Admiralty Cove, or prove the presence of the defendant on board the "Diana" on July 8th when the assault and shooting is charged in the indictment.

No witness upon the trial testified that defendant was on board the "Diana" on that occasion at that place; and *no witness* upon the trial testified either that he saw or believed he saw defendant or any person like unto him in appearance or height, or heard his voice or a voice resembling his from the "Diana" on that occasion.

Nowhere in the opinion of the learned judge of this Court is there a syllable of evidence or the testimony of a witness referred to connecting defendant Al. Weathers with this assault or showing him present on board the "Diana" when this assault and shooting took place in Admiralty Cove on July 8th.

We cannot believe that this ground for reversal was before the mind of the learned judge who wrote the opinion, because if it had been, the learned judge would have considered and noticed by decision thereon in his opinion this substantial and vital, and as it would appear, the *only real point* in the case under the assignment of errors.

The learned judge who wrote this opinion would not have failed to consider, to notice and to decide *this ground* of defendant's appeal for reversal, had

the point been pressed in the *"Argument"* portion of the defendant's brief, or attracted his attention.

In this condition of the case, the opinion *alone* considers and decides the *two* phases of the only errors of law urged in the "Argument" portion of defendant's brief, thus:

> "By several of the errors assigned the plaintiff in error questions rulings *admitting* certain evidence tending to show that *on* July 10th, which was *two days after* the shooting, witnesses recognized *the boat* 'Diana' as the same boat from which the firing had come on July 8th. It is also said that it was error on the part of the Court *to admit* testimony of a witness who said that he had seen the *defendant upon* the 'Diana' *several days after* the occurrence. But, as the important point was identification of the defendant, it is clear to us that the Court was correct in admitting the testimony for the purpose of establishing his identity and also that of the boat.
>
> "Plaintiff in error excepted to a ruling of the Court *admitting* testimony to the effect that on June 30th *before* the occurrence charged in the indictment, certain fish traps in Admiralty Cove had been opened and fish had been stolen therefrom. The Court admitted such testimony *after assurances* had been given by the District Attorney *that it would be connected with the offense charged* in the indictment. Afterwards one of the witnesses stated that in his best judgment *the boat* which he had seen about the traps *on June 30th* was the Diana, and *other witnesses said that they recognized defendant as very like one* of the men they had seen on the Diana *on June 30th* and that *they believed* defendant was the man they had seen *at that time*. For instance, the witness Ferguson was asked whether *he* had known the defendant

Weathers by sight *on June 30th.* His answer was that he did *not* know him *at that time.* We quote what follows: 'Q. When did you see him next? A. I seen him here in the court room. Q. You recognized him as the man? A. Yes. He looked very much like the man. Q. To the best of your belief, state whether or not he was the man. A. There is no doubt in my mind but what he is the man.' It was not error to admit evidence which tended to show that defendant was guilty of other *similar offenses* committed shortly *before* the time of the offense charged in the indictment. The Court expressly charged the jury that *the evidence of such other* transactions was *admitted solely* as bearing upon the question of *intent;* that if defendant did *not* do the shooting or make the assault charged, then it would not make any difference what other offenses he might have been guilty of, or with what intent any other things were done; but, if it was found that the defendant did make the assault as charged, then evidence bearing upon other assaults with intent to kill or to rob or steal from fish traps could be taken into consideration *only as bearing upon* the question of *intent* with which the acts charged in the indictment were done. This statement of the law conforms with well established rules. Moffatt v. United States, 232 Fed. 522; Deason v. United States, 254 Fed. 259, Certiorari denied, 249 U. S. 607; Byron v. United States, 259 Fed. 371; Riddell v. United States, 244 Fed. 695." (Italics ours.)

It is respectfully submitted a rehearing of this cause should be granted.

Dated, San Francisco,
January 3, 1921.

JOHN I. O'PHELAN,
CHARLES J. HEGGERTY,
Of Counsel for Plaintiff in Error

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 3, 1921.

CHARLES J. HEGGERTY,
Of Counsel for Plaintiff in Error and Petitioner.